

The Honorable Judge Coughenour

**UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

KIM KERRIGAN,

Plaintiff,

v.

BAYVIEW LOAN SERVICING, LLC;  
QUALITY LOAN CORPORATION OF  
WASHINGTON; and QUALSTAR CREDIT  
UNION,

Defendants.

Case No: 16-01528-JCC

**DEFENDANT QUALSTAR CREDIT  
UNION'S MOTION TO DISMISS  
PURSUANT TO FED. R. CIV. P.  
12(b)(6)**

**NOTE ON MOTION CALENDAR:  
NOVEMBER 4, 2016**

**I. Relief Requested**

Defendant Qualstar Credit Union ("Qualstar") moves this Court for an order dismissing Plaintiff Kim Kerrigan's ("Kerrigan") Complaint with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

**II. Statement of Facts**

Kerrigan is the owner of property commonly known as 8011 9<sup>th</sup> Avenue NW, Seattle, Washington (the "Property"). Complaint at ¶ 5. Qualstar is the beneficiary of a second-position Deed of Trust (the "Deed of Trust") recorded on April 17, 2008 that encumbers the Property. *Id.* at ¶ 5.10. The Deed of Trust secures repayment of a Home Equity Secured Line Account Variable Interest Rate (the "Note") signed by Kerrigan on April 2, 2008. A copy of the Note is

1 attached hereto as Exhibit A.

2 Kerrigan admits in her Complaint that Qualstar is not attempting to foreclose or  
3 otherwise enforce the claim represented by the Deed of Trust, but alleges that Qualstar's claim is  
4 subject to being quieted under RCW 7.28.300. Complaint at ¶ 4.3, 6.42-6.43. Because payments  
5 under the Note are not barred by the statute of limitations, Kerrigan cannot state a claim under  
6 RCW 7.28.300.

### 7 **III. Legal Argument**

#### 8 **A. Legal Standard**

9 Under Fed. R. Civ. P. 12(b)(6), a complaint may be dismissed for "failure to state a claim  
10 upon which relief can be granted." Dismissal of a complaint may be based on either the lack of a  
11 cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.  
12 *Gossen v. JP Morgan Chase Bank, N.A., et al*, 819 F. Supp. 2d 1162 (W.D. Wa. 2011), *citing*  
13 *Balistreri v. Pacifica Police Department*, 901 F.2d 696, 699 (9th Cir. 1990).

14 Where it is clear amendment would be futile, the court may dismiss the complaint  
15 without leave to amend. *See, Havas v. Thorton*, 609 F.2d 372 (9th Cir. 1979). Because no  
16 further amendment will cure the deficiencies of Plaintiff's claims against Qualstar, the Court  
17 should grant Qualstar's Motion to Dismiss with prejudice.

#### 18 **B. Judicial Notice**

19 Qualstar requests that the Court take judicial notice of the Note attached hereto as Exhibit  
20 A. The court may consider authentic documents not attached to, but relied upon by, the  
21 complaint. *See Knievel v. ESPN*, 393 F.3d 1068, 1076 (9th Cir. 2005) ("We have extended the  
22 'incorporation by reference' doctrine to situations in which the plaintiff's claim depends on the  
23 contents of a document, the defendant attaches the document to its motion to dismiss, and the  
24 parties do not dispute the authenticity of the document, even though the plaintiff does not  
25 explicitly allege the contents of that document in the complaint.").

1 Here, Kerrigan's claim that an action to foreclose on Qualstar's Deed of Trust is barred  
 2 by the statute of limitations under RCW 7.28.300 depends on the terms of the Note, Qualstar  
 3 attached the Note to its Motion to Dismiss, and the parties do not dispute the authenticity of the  
 4 document. Therefore, the Court may consider the Note on Qualstar's Motion to Dismiss.

5  
 6 **C. Plaintiff fails to state a claim against Qualstar under RCW 7.28.300**

7 Kerrigan's only claim against Qualstar is an action to quiet title under RCW 7.28.300,  
 8 which permits the owner of real estate to "maintain an action to quiet title against the lien of a  
 9 mortgage or deed of trust on the real estate where an action to foreclose such mortgage or deed  
 10 of trust would be barred by the statute of limitations." A deed of trust foreclosure remedy is  
 11 subject to a six-year statute of limitations. *Edmundson v. Bank of America*, 194 Wash.App. 920  
 12 (2016).

13 When recovery is sought on an obligation payable by installments, the statute of  
 14 limitations runs against each installment from the time it becomes due; that is, from the time  
 15 when an action might be brought to recover it. *Id.*, quoting *Herzog v. Herzog*, 23 Wash.2d 382,  
 16 161 P.2d 142 (1945); *see also*, *A.A.C. Corp. v. Reed*, 73 Wn.2d 612, 615 (1968) ("mere default  
 17 in payment does not mature the whole debt"), *Kirsch v. Cranberry Fin., LLC*, 178 Wn. App.  
 18 1031 (2013) ("The general rule for debts payable by installment provides, 'A separate cause of  
 19 action arises on each installment, and the statute of limitations runs separately against each...")

20 Here, the Note provides that for the first 180 months (the "draw period"), the minimum  
 21 monthly payment is accrued finance charges plus any portion of the minimum payments shown  
 22 on prior statement(s). Exhibit A at ¶ 5. After the draw period ends in May of 2023, the  
 23 outstanding principal balance must be paid over the following 180 months (the "repayment  
 24 period") and will mature in May of 2038. *Id.* The Note is payable by installments, repayment of  
 25 the principal balance does not start until 2023, and the loan matures in 2038. Therefore, even  
 26 assuming Kerrigan has not made a single payment under the Note, there are installment  
 payments that have become due in the last six years and there are future installment payments

1 that will become due for the next 22 years that are not barred by the statute of limitations.

2 In *Sylla v. JPMorgan Chase*, 2016 WL 4096405 (W.D.WA, 2016), the plaintiff similarly  
3 brought an action to quiet title pursuant to RCW 7.28.300, and the Court dismissed the claim  
4 with prejudice because the plaintiff was in default with respect to, at least, the past six years of  
5 payments preceding the most recent notice of trustee's sale. Similar to *Sylla*, Kerrigan has not  
6 pled a cognizable claim under RCW 7.28.300 where payments under the Note are not barred by  
7 the statute of limitations.

8 **IV. Conclusion**

9 Kerrigan's complaint fails to state a cognizable claim against Qualstar under RCW  
10 7.28.300. Furthermore, because there is no amendment that could cure the deficiencies in  
11 Plaintiff's complaint, Qualstar requests that the Court grant its Motion to Dismiss with prejudice.  
12

13 DATED this 13<sup>th</sup> day of October, 2016.

14  
15 **RCO LEGAL, P.S.**

16  
17 By /s/ John A. McIntosh  
18 John A. McIntosh, WSBA No. 43113  
19 Of Attorneys for Defendant Qualstar  
20 Credit Union  
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### Declaration of Service

The undersigned makes the following declaration:

1. I am now, and at all times herein mentioned was a resident of the State of Washington, over the age of eighteen years and not a party to this action, and I am competent to be a witness herein.

2. On October 13, 2016 I caused a copy of **Defendant Qualstar Credit Union's Motion to Dismiss Pursuant to Fed. R. Civ. P. 12(b)(6)**; and the *Proposed Order Dismissing Defendant Qualstar Credit Union* to be served to the following in the manner noted below:

Scott E. Stafne Stafne Law Firm 239 N. Olympic Ave. Arlington, WA 98223  Attorneys for Plaintiff	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> CM/ECF Electronic Notice
Joseph McIntosh McCarthy & Holthus, LLP 108 1st Ave. S., Suite 300 Seattle, WA 98104  Attorneys for Defendant Quality Loan Service Corporation of Washington	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> CM/ECF Electronic Notice
Anthony C. Soldato Gregor A. Hensrude Klinedinst, PC 801 2 <sup>nd</sup> Ave., Suite 1110 Seattle, WA 98104  Attorneys for Defendant Bayview Loan Servicing, LLC	<input checked="" type="checkbox"/> US Mail, Postage Prepaid <input type="checkbox"/> Hand Delivery <input type="checkbox"/> Overnight Mail <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> CM/ECF Electronic Notice

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1 I declare under penalty of perjury under the laws of the state of Washington that the foregoing is  
2 true and correct.

3 Signed this 13<sup>th</sup> day of October, 2016.  
4

5 /s/ Kristine Stephan  
6 Kristine Stephan, Paralegal  
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